No. 82-1009

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Petitioner,

vs.

LEE ROY HENDERSHOTT,

Defendant-Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

JAMES B. BREESE
Attorney for Defendant-Respondent
Legal Aid and Defender Program
University of Colorado
Campus Box 404, Fleming Law
Boulder, Colorado 80309
(303) 492-8126

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OPINION BELOW

The opinion of the Colorado Supreme Court, which appears in the appendix hereto, p. A-1, infra, is reported at 653 P.2d 385 (Colo. 1982).

JURISDICTION

This Court is without jurisdiction to review the Hendershott decision. The Colorado Supreme Court in Hendershott reviewed a trial court's construction of a state statute and held that the construction would violate due process under both the Colorado and United States constitutions. The Hendershott court explicitly noted that it disagreed with the trial court's construction. Absent the trial court's construction, no constitutional issue remains. The Colorado Supreme Court's construction of the statute in this case is binding upon this Court. Albertson v. Millard, 345 U.S. 242 (1953); United States v. Burnison, 339 U.S. 87 (1950).

However, should this Court believe that constitutional issues have come into play, there are independent and adequate state grounds for the Hendershott decision since it was founded upon the Colorado Constitution. These preclude this Court from granting certiorari. Murdock v. City of Memphis, 87 U.S. 290 (1874).

Additionally, this Court should not grant certiorari because the issue presented may become a moot question. A new trial has been scheduled for the Respondent for April, 1983, pursuant to the Colorado Supreme Court's order and remittitur.

QUESTIONS PRESENTED

1. Does this Court have jurisdiction by writ of certiorari to review a state supreme court decision which held that a trial court's construction of a state statute denied due process under both the state and federal constitutions?

2. May a state supreme court permit the defense to offer evidence that an accused suffered from an impaired mental condition in a general intent crime, once its state legislature has recognized that impaired mental condition is a defense to a specific intent crime?

3. Should the fact that an accused charged with a general intent crime may introduce evidence of his impaired mental condition in a sanity trial bar the admission of such evidence at trial, when it is offered to contest mens rea?

CONSTITITIONAL PROVISIONS AND STATUTES

U.S. Const. amend. XIV, §1, which states in relevant part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Colo. Const. art. II, §25, which states:

> No person shall be deprived of life, liberty or property, without due process of law.

Colo. Rev. Stat. §18-1-803 (1978), which states:

> Evidence of an impaired mental condition though not legal insanity may be offered in a proper case as bearing upon the capacity of the accused to form the specific intent if such an intent is an element of the offense charged.

Colo. Rev. Stat. §18-1-805 (1978), which states:

> The issue of responsibility under Sections 18-1-801 to 18-1-804 is an affirmative defense.

Colo. Rev. Stat. §18-3-204 (1978), which states:

> A person commits the crime of assault in the third degree if he knowingly or recklessly causes bodily injury to another person or with criminal negligence he causes bodily injury to another person by means of a deadly weapon. Assault in the third degree is a class 1 misdemeanor.

STATEMENT OF THE CASE

In April of 1979, Respondent Lee Roy Hendershoot was charged with "knowingly" or "recklessly" causing bodily injury to one Patricia Styskal, in violation of Colo. Rev. Stat. §18-3-204 (1978), third degree assault. At trial, evidence showed Mr. Hendershott had inflicted injuries upon the victim and then had fallen asleep or unconscious, a condition in which he remained until the police arrived.

While awaiting trial, Mr. Hendershott was attended to by a jail treatment team consisting of a psychiatrist, a physician and a psychiatric nurse. There he was diagnosed as suffering from adult minimal brain dysfunction, an illness akin to hyperactivity in children. At a bond hearing, testimony was adduced that this condition rendered the defendant extremely deficient in impulse control. In certain situations his conduct could be "an automatic response to stimuli", he might "not even be conscious of what was happening" and his conduct could be "completely out of his control." (A-4).

In the course of pretrial discovery the prosecution learned that the defense intended to offer at trial expert opinion evidence in order to establish that the defendant, due to adult minimal brain dysfunction, lacked the capacity to form the requisite mens rea culpability of "knowingly" or "recklessly" causing bodily injury, as third degree assault requires. The district attorney filed a pretrial motion to exclude this evidence arguing that Colo. Rev. Stat. §18-1-803 (1978) restricts evidence of impaired mental condition to specific intent crimes and that third degree assault was not a specific intent crime.

The Boulder County Court agreed, construing §18-1-803 to exclude evidence of an impaired mental condition in non-specific intent crimes. The jury found the defendant guilty and he was sentenced to six months in jail. The Boulder District Court

affirmed this conviction. The Colorado Supreme Court then granted certiorari to consider the issue of whether opinion evidence of a mental impairment due to a mental disease or defect could be admitted to negate the mens rea for a non-specific intent crime such as assault in the third degree.

The Colorado Supreme Court ruled unanimously that the trial court's construction of §18-1-803 violated the due process clauses of both the Colorado and the United States Constitutions. The Colorado Supreme Court reasoned that so long as the offense included a culpable mental state which had to be proven by the prosecution beyond a reasonable doubt, it would deny due process to preclude a defendant from presenting evidence to contest this element of the offense. (A-15). It further stated that exclusion of such defense evidence would effectively reduce the state's burden of proof and undermine the defendant's presumption of innocence. (A-14,15). The court carefully distinguished this due process right to contest the prosecution's proof of mens rea from the creation of any affirmative defense of impaired mental condition for general intent crimes. (A-9-15). The court further stated that it did not agree with the trial court's construction that §18-1-803 barred the admission of impaired mental condition evidence in general intent crimes. Petitioner sought a rehearing which was denied, and then filed its petition requesting a writ of certiorari from this Court.

REASONS FOR DENYING THE WRIT

I. Where a state supreme court undertakes its own analysis of due process and cites federal cases only to support fundamental principles of criminal law, its decision rests upon an independent and adequate state ground.

Throughout its brief, Petitioner refers to the Colorado Supreme Court's interpretation of "the Constitution," and in its

list of constitutional authorities cited only the 14th Amendment to the U.S. Constitution. In fact, the decision in Hendershott was founded on both the state and federal constitutions.

This Court has repeatedly recognized that state courts are the arbiters of their own constitutions. "It is fundamental that state courts be left free and unfettered by us in interpreting their own constitutions." Minnesota v. National Tea Co., 309 U.S. 551, 557 (1940); Air Pollution Variance Board v. Western Alfalfa Corp., 416 U.S. 861 (1974). Unless Petitioner has shown that there is no independent and adequate state ground for the decision, this Court's ruling on what is required by the federal constitution would have no impact on the result in Hendershott and would "amount to nothing more than an advisory opinion." Herb v. Pitcairn, 324 U.S. 117, 126 (1945).

The mere fact that federal cases are cited does not mean a state court has exercised no independent analysis of its own constitution. Instead, the question is whether the state court felt so obligated to follow what it perceived as federal law that it engaged in no independent analysis of its own constitution and cases. Jankovich v. Indiana Toll Road Commission, 379 U.S. 487 (1965). Petitioner has cited several decisions of this Court to suggest that certiorari should be granted. However, Hendershott is not a decision that cited only one state case, which in turn was founded on federal opinions, as authority, as in Oregon v. Kenne[illegible], 102 S. Ct. 2083 (1982). Nor is it an opinion which dealt exclusively with the federal constitution and then concluded that any violation of that document would necessarily be a violation of its similar state provisions, as in Delaware v. Prouse, 440 U.S. 648 (1979).

In contrast, the outcome in Hendershott is not dictated by federal cases. Where federal cases are cited, they are in support only of basic principles of law, long recognized in Colorado.

Federal cases were not necessary to the result in Hendershott; instead it follows from past decisions of the Colorado Supreme Court and its commitment to uphold due process.

As the Hendershott opinion notes, to be convicted of most crimes, an accused must have committed an unlawful act as the result of a culpable mental state, or mens rea. A 1981 Colorado case, People v. Marcy, 628 P.2d 69 (Colo. 1981), is cited in support and in turn relies on Kent v. People, 8 Colo. 563, 9 P. 852 (1886), which indicates that a culpable mental state was required in Colorado criminal law as early as 1872.

A second fundamental principle is that an accused is presumed innocent of charges against him. Justice Quinn described this principle as "axiomatic," and again relied on a Colorado opinion, People v. Hill, 182 Colo. 253, 512 P.2d 257 (1973). The Hill opinion cites several Colorado decisions in portraying the presumption of innocence as a "nucleus" of Anglo-American criminal law. The presumption of innocence necessitates a third principle--the requirement of proof by the prosecution beyond a reasonable doubt of every fact necessary to constitute a crime.

In explaining the importance of the reasonable doubt standard, the Hendershott opinion quoted from In Re Winship, 397 U.S. 358 (1970). However, as Justice Quinn observed, People ex. rel. Juhan v. District Court, 165 Colo. 253, 439 P.2d 741 (1968), recognized that the reasonable doubt standard was vital to due process under the Colorado Constitution in 1968, two years before Winship was announced by this Court. Juhan held that a Colorado statute which required a defendant to prove insanity by a preponderance of the evidence violated due process, despite this Court's decision in Leland v. Oregon, 343 U.S. 790 (1952). Juhan recognized that Colorado courts, relying on stare decisis, had required the reasonable doubt standard as a "fundamental principle of criminal justice" for about a century. Juhan, supra, at 263, 746. It

was only after the Colorado legislature passed a statute shifting the burden of proof on insanity that the Colorado Supreme Court turned to a due process analysis and found the statute unconstitutional.

The presumption of innocence and the requirement of proof beyond a reasonable doubt, including of mens rea, are the principles upon which Hendershott rests. The core of Justice Quinn's reasoning is that prohibiting a defendant from introducing evidence on mental impairment renders the issue of mental culpability uncontestable. When this element cannot be contested by defense evidence, the effect is that of a presumption of culpability. Such a presumption would be inconsistent with the presumption of innocence and would diminish the prosecution's burden below that of proof beyond a reasonable doubt.

Justice Quinn relied on People v. Cornelison, 192 Colo. 337, 559 P.2d 1102 (1977), to conclude that it "would be a violation of due process to require the prosecution to establish the culpable mental state beyond a reasonable doubt while at the same time, to prohibit a defendant from presenting evidence to contest the issue." (A-9). In Cornelison, The Colorado Supreme Court held that lack of mental capacity which resulted in a defendant's inability to entertain specific intent was a defense to second degree murder, despire a statutory provision barring the defense in such cases.

The Cornelison decision was based on reasoning "that to hold otherwise would effectively relieve the People of the burden of proving every essential element of the charge beyond a reasonable doubt." Id., at 340-341, 1105. The court cited a Pennsylvania case, Commonwealth v. Graves, which noted that it would be an "anomaly to suggest that although the Commonwealth must establish the existence of a mental state beyond a reasonable doubt...yet preclude the defendant from producing relevant evidence to contest the issue." 461 Pa. 118 at 126, 334 A.2d 661 at 665 (1975) (cited in Cornelison at 341, 1105). However, the Colorado Supreme

Court in Cornelison went further. "More than an anomaly, such a holding would deprive defendant of his right, secured by the Due Process Clause, to require proof beyond a reasonable doubt of every element of the crime charged." Cornelison, supra, at 341, 1105.

Cornelison then cited In Re Winship, supra, and People v. Kanan, 186 Colo. 255, 526 P.2d 1339 (1974), another Colorado decision which is also relied on in Hendershott. Winship clearly supports the requirement that proof be beyond a reasonable doubt, but the conclusion that precluding a defendant from producing relevant evidence violates due process is not explicit in Winship and was the result of independent reasoning.

Justice Quinn in Hendershott relied on a second line of Colorado cases to distinguish between the trial court's denial of a defendant's right to present evidence and the state's right to limit affirmative defenses. According to the trial court, the statute limiting the impaired mental condition affirmative defense to specific intent crimes required that any mental impairment evidence was inadmissible as a matter of law. In the cases cited by Hendershott, People v. Morgan, 637 P.2d 338 (Colo. 1981), People v. Gallegos, 628 P.2d 999 (Colo. 1981), People v. Fite, 627 P.2d 761 (Colo. 1981), and People v. Ledman, 622 P.2d 534 (Colo. 1981), the Colorado Supreme Court upheld the affirmative defense limitation in cases where defendants had been charged with both specific and general intent crimes. However, the court in these cases explained that evidence had been admitted to contest the culpability of all crimes charged, without being restricted to only specific intent crimes. These opinions indicated that the exclusion of such evidence was a distinct issue.

In Hendershott, Justice Quinn concluded that excluding "mental evidence rendered prosecution evidence uncontestable as a matter of law on the issue of mens rea. (A-13). When insulated from counterproof, the prosecution's evidence "in practical

effect becomes so compelling as to assume all of the features of a presumption," (A-14), which clashes with the presumption of innocence. Additionally, because defense evidence may be crucial to raise a reasonable doubt about the prosecution's case, denying the opportunity to controvert prosecution evidence "downgrades the prosecution's burden to something less than that mandated by due process of law." (A-15).

The Colorado Supreme Court's conclusion that due process had been violated was the product of independent reasoning, going beyond the mere statement of fundamental principles. Resting as it does on Colorado's interpretation of the requirements of the presumption of innocence and the reasonable doubt standard, Hendershott is based on an independent and adequate state ground.

Colorado has a long history of independent analysis under its own constitution. Thus, despite Leland v. Oregon's holding that it was permissible under the federal constitution to impose the burden of proof upon a defendant in an insanity defense, Colorado interpreted its own constitution to find that requiring an accused to prove he was insane by a preponderance of the evidence violated due process. Juhan v. District Court, supra. More recently, in Charnes v. DiGiacomo, 612 P. 2d 1117 (Colo. 1980), the Colorado Supreme Court ruled that Colorado citizens had a reasonable expectation of privacy in their business records. This was protected by the Colorado constitution's provisions against unreasonable search and seizure, in spite of United States v. Miller, 425 U.S. 435 (1976), which held there was no federal constitutional protection. In People v. Hoinville, 191 Colo. 357, 553 P.2d 777 (1976), the court ruled that arrest warrants were required for arrests in Colorado despite U.S. v. Watson, 423 U.S. 411 (1976). In Denver v. Nielson, 194 Colo. 407, 572 P.2d 484 (1977), the court ruled that ordinances barring massages to to persons of the opposite sex were unconstitutional despite federal rulings upholding statutes forbidding such conduct.

In 1977, the Colorado Supreme Court affirmed the principle that states could impose greater restrictions on police activity than those minimally mandated by the federal constitution. People v. Hayhurst, 194 Colo. 292, 571 P.2d 721(1977). People v. Marcy, supra, in 1981, noted that the Equal Protection Clause had been enforced more strictly under the Colorado Constitution than in federal cases. This Court has repeatedly recognized a state's power to interpret its own constitution to afford broader protections than those that may be required by the federal constitution. Cooper v. California, 386 U.S. 58 (1967), Ker v. California, 374 U.S. 23 (1963). This is at most all that has occurred in the Hendershott decision.

The Hendershott opinion reflects Colorado's history of independent analysis of its own constitution. Hendershott is founded independently and adequately upon the Colorado constitution. Certiorari is inappropriate under Murdock, supra, particularly when Petitioner has failed to prove that adequate state grounds are lacking. Mental Hygiene Dept. v. Kirchner, 380 U.S. 194 (1965).

Were there substantial ambiguity in the opinion, however, the proper recourse is not to grant certiorari, but to remand the case for further proceedings to determine whether there was indeed an independent state basis for the decision. Air Pollution Variance Board, supra; California v. Krivda, 409 U.S. 33 (1972); Mental Hygiene Dept., supra; National Tea Co., supra.

Petitioner contends, as a basis for jurisdiction, that the Hendershott opinion is in direct conflict with the Alaska Supreme Court's decision in Mill v. State, 585 P.2d (Alaska 1978), cert denied, 444 U.S. 287 (1979). However, a close reading of Mill v. State indicates the issue there was whether impaired mental condition would be a defense in a general intent crime. In contrast, the question in Hendershott was whether mental impairment evidence could be excluded, not whether it would rise to the level of a defense.

Petitioner also submits that Hendershott is inconsistent with

the decisions of eight other jurisdicitons which refused such evidence even to negate specific intent. In failing to recognize the defense at all, the decisions cited by Petitioner referred to a mistrust of psychiatric evidence and its evaluation by juries, or a belief that implementation of the defense should be left to legislatures. Colorado differs from these jurisdictions because its legislature has authorized the use of mental impairment evidence as a defense to certain crimes. In addition, as Hendershott notes, the Colorado Supreme Court "has long recognized the reliability and usefulness of psychiatric opinion evidence..." (A-18).[1]

In any event, Petitioner's argument is of minimal significance. A conflict between state courts is a reason for granting certiorari under Supreme Court Rule 17(1)(a) only if the conflict embraces a federal question. This Court does not hold the 50 states to uniform treatment of issues related to the insanity defense or mens rea. Leland, supra, Fisher v. United States, 328 U.S. 463 (1945). In the words of this Court, "The administration of criminal law in matters not affected by constitutional limitations or a general federal law is a matter peculiarly of local concern." Fisher, supra, at 476.

II. Once a state legislature has recognized that impaired mental condition is a defense to specific intent crimes, a state supreme court may permit the defense to offer evidence that an accused suffered from an impaired mental condition in a general intent crime.

In Colorado, the legislature has recognized that there are degrees of mental impairment distinct from insanity, Colo. Rev.

[1] It is also worth noting that in one of the cases cited by Petitioner, State v. Sikora, 44 N.J. 453, 210 A.2d 196 (1965), New Jersey had acknowledged the defense but held there that it did not include excusing a defendant on the basis of "psycho-dynamics" - the theory that present circumstances and the past events in one's life combine to make behavior virtually automatic. Additionally, the court in another case cited by Petitioner, Bethea v. United States, 365 A.2d 64 (D.C. App. 1976), cert denied, 433 U.S. 911 (1977), indicated that if expert testimony was admitted on a defendant's capacity to form specific intent, it should be allowed on general intent as well.

Stat. §18-1-803 (1978). An impaired mental condition is even an affirmative defense for specific intent crimes, Colo. Rev. Stat. §18-1-805 (1978). By authorizing this affirmative defense, the legislature obviously recognized that the field of psychiatry had reached a sufficiently sophisticated level that it could provide reliable testimony concerning impaired mental conditions.

Petitioner contends that the Hendershott decision may be contrary to this court's decision in Fisher v. United States, supra, and Leland v. Oregon, supra. Petitioner states that Fisher held there was no absolute federal constitutional right to present evidence of an impaired mental condition at trial. In Fisher the jury apparently actually heard the evidence of the defendant's impaired mental condition, an event which did not occur in Hendershott. However, the trial court disallowed a defense tendered instruction that such condition, although not amounting to insanity, could be a defense. Hendershott did not hold that such evidence could be a defense to general intent crimes, but merely held such evidence should be admissible to contest the prosecutor's proof. This Court affirmed the trial court in Fisher, but founded its decision on the fact that neither the legislature, nor the lower courts had yet recognized "more possible classifications of mentality than the sane and the insane." It refused to judicially create a defense for a concept not yet legislatively noticed. By contrast, Colorado has legislatively noticed the existence of impaired mental conditions not rising to insanity.

Nor is Leland v. Oregon authority contrary to Hendershott. Leland dealt with the appropriateness of a burden of proof once a plea of insanity has been raised. It did not deal with the question of the admissibility of impaired mental condition evidence. This Court merely held that it was permissible under the federal constitution for a state to put the burden of proof

beyond a reasonable doubt on insanity upon a defendant. (Colorado later rejected this as a violation of the due process clause of its own constitution in People ex rel. Juhan v. District Court, supra). The Leland decision is replete with references to the great latitude with which a state's policy distinctions in the area of mental defenses should be afforded. This is so because,

> The choice of legal sanity involves not only scientific knowledge but questions of basic policy as to the extent to which that knowledge should determine criminal responsibility. 343 U.S. 801.

Leland states that although Oregon's policy was uniquely harsh upon the defendant, it nevertheless did not offend federal due process standards. If the harshest policy in the land fails to offend the federal constitution, it is difficult to perceive such offense from Colorado's unusually enlightened policy. Neither Fisher nor Leland was discussed by the Court in Hendershott precisely because of these distinctions.

Petitioner further contends that the Supreme Court of Colorado failed to recognize the significance of Patterson v. New York, 432 U.S. 197 (1977). But Patterson involved the question of whether the burden of proof could be put upon a defendant to establish an affirmative defense. As previously noted the Hendershott decision did not authorize any affirmative defense of impaired mental condition for general intent crimes. It merely held that the defendant had a due process right to present evidence of mental impairment to contest the prosecution's evidence of mens rea. Furthermore, the affirmative defense evidence in Patterson did not negative any element of the offense charged. By contrast Respondent had been prevented from offering evidence which contested an element of the crime.

To summarize, the Colorado legislature has recognized the defense of impaired mental condition for specific intent

crimes. This fact distinguishes Hendershott from the situations presented in Fisher and Leland. The Hendershott decision did not create an affirmative defense of impaired mental condition for general intent crimes. Instead it ruled the defense had a due process right to offer evidence controverting prosecution evidence concerning an element of a crime. Hendershott is not, therefore, inconsistent with any precept of Patterson.

III. The mere fact that an accused charged with a general intent crime may offer evidence of his impaired mental condition at a sanity trial should not bar the admission of such evidence at a trial.

Petitioner argues that since a defendant has a theoretical right to present evidence of his impaired mental condition at a sanity trial, he should have no right to again present the same evidence at trial. This argument has a serious and fatal flaw: It assumes that the concepts of sanity and mens rea are interchangeable. In fact, the sine qua non of an impaired mental condition is in fact one of those other "possible classifications of mentality than the sane and the insane" that this Court referred to in Fisher, supra, at 475. Thus proof of an impaired mental condition would not necessarily suffice as proof of insanity. As such, this evidence might not even be material if offered at a sanity proceeding.

That the Colorado legislature recognized the distinction between mens rea and insanity is clear form the language of Colo. Rev. Stat. §18-1-803 (1978) itself:

> Evidence of an impaired mental condition though not legal insanity may be offered in a proper case as bearing upon the capacity of the accused to form a specific intent if such intent is an element of the offense charged. (Emphasis added.)

As the Colorado Supreme Court stated, the statute "is premised on the proposition that a mental disease or defect may be less than insanity but nonetheless sufficient to negate the requisite mens rea of specific intent." (A-17, fn. 8). By its terms

§18-1-803 authorizes the admission of impaired mental condition evidence, as an affirmative defense, at the trial of specific intent offenses, regardless of whether the same evidence has been offered at a sanity trial. Logically extended, the People's argument would prohibit such testimony at a trial in specific intent offenses, something the legislature refused to do.

If Colorado has determined such evidence is reliable and probative in the issue of mens rea in specific intent offenses,

> There is no reason to believe that psychiatric evidence would be any less helpful to the fact finder in resolving whether a defendant acted "knowingly" or "recklessly" than in determining whether he had the capacity to form the "specific intent." (A-18).

Therefore, evidence of an impaired mental condition should be admissible at the trial of a general intent offense, even though it may not constitute an affirmative defense.

Regardless of whether or not there has been a sanity trial, the issue at trial remains whether or not the prosecution has met its burden of proof. As the Colorado Supreme Court stated,

> The prosecution's burden of proof on the requisite mens rea for a crime is no less where the sanity issue has not been raised at all. In both instances, the requisite mens rea must be proven beyond a reasonable doubt or the defendant is entitled to an acquittal. (A-17).

Therefore, the mere fact that a defendant charged with a general intent offense may have an opportunity to present evidence of an impaired mental condition at a sanity trial should not bar the admission of such evidence at a trial on the merits.

Petitioner also argues that since Respondent failed to plead not guilty by reason of insanity, Williams v. Florida, 399 U.S. 78 (1970) and Wardius v. Oregon, 412 U.S. 470 (1973), justify the exclusion of his impaired mental condition evidence

at trial. However, these cases involved the issue of reciprocal discovery which was not a problem here. In fact, the prosecution's motion in limine which resulted in the exclusion of the defendant's evidence at trial was the product of defendant's response to the prosecution's discovery request.

Petitioner's final argument that persons acquitted by reason of their impaired mental condition should not be completely set free was well answered by the Colorado Supreme Court:

> As we see it, the solution to the problem posed by the People does not lie in barring the admission of mental impairment evidence to negate the requisite culpability for the crime charged, but rather for providing for the confinement and treatment of persons who are mentally ill and pose a danger to themselves or others. See People v. Wetmore, 22 Cal.3d 318, 583 P.2d 1308, 149 Cal. Rptr. 265 (1978); Wesson, Mens Rea and the Colorado Criminal Code, 52 U. Colo. L. Rev. 167, 200 (1981). (A-19-A-20).

In summary, the mere possible opportunity of an accused to present evidence of an impaired mental condition at a sanity trial should not preclude him from offering evidence of his condition to rebut the issue of whether he possessed the requisite mens rea at trial. Nor may the evidence be excluded for any failure by the Respondent to have complied with appropriate pretrial discovery procedures.

CONCLUSION

This Court is without jurisdiction because the Colorado Supreme Court's decision was founded upon independent and adequate state grounds. Furthermore the Hendershott decision was not inconsistent with any decision of this Court. Certiorari should therefore be denied.

Respectfully submitted,

James B. Bredse
Attorney for Respondent*
LEGAL AID AND DEFENDER PROGRAM
University of Colorado
Campus Box 404, Fleming Law
Boulder, CO 80309
492-8126

*The substantial assistance of Karen Chaney, a student at the University of Colorado School of Law, in the writing of this Brief in Opposition is hereby gratefully acknowledged.

IN THE SUPREME COURT OF THE STATE OF COLORADO

NO. 80SC345

LEE ROY HENDERSHOTT,	)	
	)	
Petitioner	)	
	)	
v.	)	September 27, 1982
	)	
THE PEOPLE OF THE STATE OF COLORADO,	)	
	)	
	)	
Respondent	)	

Certiorari to the District Court

of the

County of Boulder

Honorable Rex H. Scott, Judge

EN BANC

JUDGMENT REVERSED AND CAUSE REMANDED

James B. Breese, Legal Aid and Defender Program
University of Colorado School of Law
Boulder, Colorado

Attorney for Petitioner

J. D. MacFarlane, Attorney General
Richard F. Hennessey, Deputy Attorney General
Mary J. Mullarkey, Solicitor General
John Daniel Dailey, Assistant Attorney General
Denver, Colorado

Attorneys for Respondent

JUSTICE QUINN delivered the opinion of the Court.

We granted certiorari to review a judgment of the Boulder District Court affirming the conviction of Lee Roy Hendershott (defendant) for assault in the third degree. Section 18-3-204, C.R.S. 1973 (1978 Repl. Vol. 8). The defendant was charged with knowingly or recklessly causing bodily injury to Patricia Styskal on April 28, 1979. In the course of a jury trial before the Boulder County Court the defendant offered psychiatric and psychological opinion evidence establishing that he suffered from adult minimal brain dysfunction for the purpose of negating the culpability elements of third degree assault. The trial court ruled that section 18-1-803, C.R.S. 1973 (1978 Repl. Vol. 8), which establishes the affirmative defense of impaired mental condition for specific intent crimes, renders mental impairment evidence inadmissible as a matter of law in the prosecution of any crime not requiring a culpability element of specific intent. The defendant was convicted and, on appeal to the Boulder District Court, his conviction was affirmed. We conclude that the trial court's ruling, which precludes the defendant from presenting any mental impairment evidence to negate the requisite culpability for the crime charged against him, violates due process of law under the United States and Colorado Constitutions. U.S. Const. Amend. XIV; Colo. Const. Art. II, Sec. 25. Accordingly, we reverse the defendant's conviction and remand for a new trial.[1]

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[1] Because of our disposition of the case we do not address the defendant's other claims, namely: that the trial court's ruling denied him due process of law by preventing him from offering evidence establishing his incapacity to satisfy even the minimum requirement for criminal liability of performing a voluntary act, section 18-1-501(9), C.R.S. 1973 (1978 Repl. Vol. 8); and that, in view of section 18-1-804(3), C.R.S. (Continued)

I.

In April 1979 the defendant was living in the rooming house of Patricia Styskal, whom he had dated intermittently for approximately three years. Problems developed in their relationship due to the defendant's excessive drinking, and on April 28, 1979, Ms. Styskal told the defendant he would have to move out. She drove him to a friend's house and then went to visit her sister. At approximately 9:30 p.m. the defendant returned to the rooming house and asked Richard Jacobs, a boarder, where Ms. Styskal was. After being told that she was not there, the defendant, who in Jacobs' opinion seemed to be somewhat intoxicated, stepped inside. He then began to talk incoherently, occasionally placing his hand on Jacobs' shoulder. Jacobs felt threatened by this gesture and left the house with the defendant in close pursuit. After Jacobs succeeded in pacifying the defendant, they returned to the house. Once again Jacobs left the house and the defendant chased him. A brief struggle ensued in the front yard but Jacobs was able to flee to the home of a friend.

At approximately 11:00 p.m. Ms. Styskal returned home and found the defendant waiting in her bedroom. The defendant accused her of having been out with another man. He then struck, kicked, and began to choke her. She was able to escape and fled to a neighbor's home. The police, who were immediately summoned, found the defendant unconscious in an upstairs bedroom of Ms. Styskal's home, and he was immediately

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1973 (1978 Repl. Vol. 8), which allows a defendant to offer evidence of involuntary intoxication to establish his incapacity to conform his conduct to the requirements of law, the exclusion of mental impairment evidence to negate the requisite culpability for nonspecific intent crimes violates equal protection of the laws.

arrested and charged with assault in the third degree.

In the course of pretrial discovery the district attorney learned that defense counsel intended to offer at trial expert opinion evidence in order to establish that the defendant, due to adult minimal brain dysfunction,[2] lacked

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[2] Prior to trial the defendant was evaluated at the county jail by a treatment team consisting of a psychiatrist, Dr. Jed Shapiro, a psychiatric nurse, Connie Kendle, and a jail psychologist, Steven Fox. During a pretrial bond hearing Nurse Kendle testified that the defendant was diagnosed as suffering from adult minimal brain dysfunction, a condition characterized by heightened anxiety and a lack of impulse control approaching an automatic response to stimuli. Nurse Kendle testified that this disorder is similar to hyperactivity in children and only recently has been diagnosed in adults. In her opinion adult minimal brain dysfunction may cause the person to be "completely out of control" and not even conscious of what is happening. In this respect adult minimal brain dysfunction resembles an "intermittent explosive disorder" which is characterized by "several discrete episodes of loss of control of aggressive impulses that result in serious assault or destruction of property." American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders III at 295 (1980). The essential features of the "intermittent explosive disorder" are described as follows:

> "The degree of aggressivity expressed during an episode is grossly out of proportion to any precipitating psychological stressor. The individual may describe the episodes as 'spells' or 'attacks.' The symptoms appear within minutes or hours and, regardless of duration, remit almost as quickly. Genuine regret or self-reproach at the consequences of the action and the inability to control the aggressive impulse may follow each episode.... The behavior is usually a surprise to those in the individual's milieu, and even the afflicted individual is often startled by his or her behavior, sometimes describing the events as resulting from a compelling force beyond his or her control, even though he or she is willing to accept responsibility for his or her actions.... [F]eatures suggesting an organic disturbance may be present, such as nonspecific EEG abnormalities or minor, neurological signs and symptoms thought to reflect subcortical or limbic dysfunction .... Medical history often reveals hyperactive motor behavior and proneness to accident.... The disorder is apparently very rare." Id. at 295-96.

It has been reported that clinical and experimental evidence indicates that "explosive rage" often results from disorders which affect the limbic system, a phylogenetically ancient portion of the brain which is concerned not only with the expression (Continued)

the requisite culpability of "knowingly" or "recklessly" essential to the crime of assault in the third degree. The district attorney filed a pretrial motion to exclude this evidence, arguing that section 18-1-803, C.R.S. 1973 (1978 Repl. Vol. 8), restricts evidence of impaired mental condition to specific intent crimes[3] and that third degree assault was not a specific intent offense. The county court ruled the evidence inadmissible as a matter of law in prosecutions for crimes not requiring specific intent as an essential element of culpability. The jury found the defendant guilty and he was sentenced to six months with credit for time served.[4] The district court affirmed his conviction because, in its view, "evidence of mental impairment is inapplicable to a general intent offense, and the trial court did

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of emotion, but also with neural control of visceral functions and chemical hemostasis. Elliott, Neurological Factors In Violent Behavior, 4 Bull. Amer. Acad. Psychiatry and Law 297 (1976); Elliott, The Neurology of Explosive Rage, 217 Practitioner 51 (1976). The emotional dyscontrol which characterizes the "explosive rage" bears little resemblance to conventional anger, there being what appears to be a total transformation of the personality during these episodes.

3 Section 18-1-501(5), C.R.S. 1973 (1978 Repl. Vol. 8), states that all crimes "in which the mental culpability requirement is expressed as 'intentionally' or 'with intent' are declared to be specific intent offenses." This same section also provides that a person acts "intentionally" or "with intent" when "his conscious objective is to cause the specific result proscribed by the statute defining the crime." All crimes in which the mental culpability requirement is expressed as "knowingly" or "willfully" are general intent crimes. Section 18-1-501(6), C.R.S. 1973 (1978 Repl. Vol. 8). Because the mental element of "recklessly" represents a less serious form of culpability than the element of "knowingly," section 18-1-503(3), C.R.S. 1973 (1978 Repl. Vol. 8), a crime with the culpability requirement of "recklessly" is obviously not one of specific intent.

4 Assault in the third degree is a class 1 misdemeanor punishable by a sentence of not less than six nor more than twenty-four months in the county jail or by a fine of $500 to $5,000, or both. Section 18-1-106, C.R.S. 1973 (1981 Supp.).

not err in excluding [such evidence]." We granted certiorari to consider the issue whether opinion evidence of a mental impairment due to a mental disease or defect may be admitted to negate the mens rea for a nonspecific intent crime such as assault in the third degree.

The defendant's contention on this appeal is that the trial court's ruling prohibited him from negating the essential culpability element of third degree assault in violation of due process of law, U.S. Const. Amend. XIV; Colo. Const. Art. II, Sec. 25. The People counter this contention with several policy considerations in support of a rule prohibiting an accused from offering evidence of impaired mental condition to contest the culpability elements except for specific intent crimes. Additionally, the People contend that even if the trial court's ruling was erroneous, the error was harmless. Before considering the respective claims of the parties we review some basic precepts of criminal and constitutional law to illuminate our analysis.

II.

It is not open to question that the power to define criminal conduct and to establish the legal components of criminal liability is vested with the General Assembly. Colo. Const. Art. V, Sec. 1; see, e.g., Patterson v. New York, 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977). Rarely, however, will a legislative body attempt to impose the sanctions of the criminal law on the blameless. Generally, in order to subject a person to criminal liability for a felony or serious misdemeanor, there must be a concurrence of an unlawful act (actus reus) and a culpable mental state (mens rea). E.g., United States v. Bailey,

444 U.S. 394, 100 S. Ct. 624, 62 L. Ed. 2d 575 (1980); Morissette v. United States, 342 U.S. 246, 72 S. Ct. 240, 96 L. Ed. 288 (1952); People v. Marcy, 628 P.2d 69 (Colo. 1981). The Colorado Criminal Code recognizes this general precept by providing that "the minimum requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or the omission to perform an act which [the actor] is physically capable of performing." Section 18-1-502, C.R.S. 1973 (1978 Repl. Vol. 8). A "voluntary act" is an "act performed consciously as a result of effort or determination...." Section 18-1-501(9), C.R.S. 1973 (1978 Repl. Vol. 8). In most instances the legislature has required a more blameworthy level of culpability than the performance of a mere voluntary act, such as conduct performed "intentionally," "knowingly," "willfully," "recklessly," or "with criminal negligence." See section 18-1-501, C.R.S. 1973 (1978 Repl. Vol. 8).

Once a person is charged with violating the criminal law, basic principles of constitutional law come into play and apply throughout the prosecution of the case. It is axiomatic that an accused is presumed innocent of the charge, and this presumption extends to every element of the crime including the requisite mens rea. E.g. Taylor v. Kentucky, 436 U.S. 478, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978); Morissette v. United States, supra; People v. Hill, 182 Colo. 253, 512 P.2d 257 (1973). Additionally, due process of law requires the prosecution to prove beyond a reasonable doubt every fact necessary to constitute the crime charged before the accused may be convicted and subjected to punishment. As the United States Supreme Court observed in In Re

Winship, 397 U.S. 358, 363-64, 90 S. Ct. 1068, 1072, 25 L. Ed. 2d 368, 375 (1970), the reasonable doubt standard is the foundation upon which the American criminal justice system rests:

> "The standard provides concrete substance for the presumption of innocence -- that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.' ..."
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> "The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt.... To this end, the reasonable-doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue.'"

Accord, e.g., Sandstrom v. Montana, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979); Patterson v. New York, supra; Mullaney v. Wilbur, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975). Even before the Supreme Court's decision in In Re Winship, this court recognized the reasonable doubt standard as a vital component of the Due Process Clause of the Colorado Constitution. People ex rel. Juhan v. District Court, 165 Colo. 253, 439 P.2d 741 (1968).

In addition to establishing the essential elements of criminal conduct, it is within the legislature's prerogative to formulate principles of justification or excuse, usually denominated affirmative defenses, and to limit these defenses to a particular category of crimes, so long as the basic rights of the criminally accused are not thereby impaired. E.g., Patterson v. New York, supra; People v. Ledman,

622 P.2d 534 (Colo. 1981). The formulation and the limitation of affirmative defenses, however, must be distinguished from the accused's right to present reliable and relevant evidence to controvert the prosecution's case against him. "Few rights are more fundamental than that of an accused to present witnesses in his own defense." Chambers v. Mississippi, 410 U.S. 284, 302, 93 S. Ct. 1038, 1049, 35 L. Ed. 2d 297, 312 (1973); see Washington v. Texas, 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967) (state statutory scheme which prevented an accused from securing coparticipant's testimony at trial denied the accused his constitutional right to compulsory process for obtaining witnesses in his favor).

As this court observed in People v. Cornelison, 192 Colo. 337, 559 P.2d 1102 (1977), much more than being a mere anomoly, it would be a violation of due process to require the prosecution to establish the culpable mental state beyond a reasonable doubt while, at the same time, to prohibit a defendant from presenting evidence to contest this issue. Such a prohibition assumes all the features of an impermissible presumption of culpability. While it may be permissible to permit a jury to infer an essential ingredient of a crime from a proven fact so long as there is a rational connection between the proven fact and the inferred fact, e.g., Barnes v. United States, 412 U.S. 837, 93 S. Ct. 2357, 37 L. Ed. 2d 380 (1973); Tot v. United States, 319 U.S. 463, 63 S. Ct. 1241, 87 L. Ed. 1519 (1943), it is quite another matter to insulate this ingredient from disproof by defense evidence. A rule precluding the defendant from contesting the culpability element of the charge would render the prosecution's evidence on that issue uncontestable

as a matter of law, in derogation of the presumption of innocence and the constitutional requirement of prosecutorial proof of guilt beyond a reasonable doubt. E.g., Sandstrom v. Montana, 442 U.S. at 520-24, 99 S. Ct. at 2457-59, 61 L. Ed. 2d at 48-51; Morissette v. United States, 342 U.S. at 274-75, 72 S. Ct. at 255-56, 96 L. Ed. at 306-07. With these principles in mind, we turn to the challenged ruling of the trial court.

III.

The charge in this case alleged that the defendant committed the crime of assault in the third degree by "knowingly" or "recklessly" causing bodily injury to another person. Section 18-3-204, C.R.S. 1973 (1978 Repl. Vol. 8). The statutory definitions of the terms "knowingly" or "recklessly" are as follows:

> "A person acts 'knowingly' ... with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of such nature or that such circumstance exists. A person acts 'knowingly' ..., with respect to a result of his conduct, when he is aware that his conduct is practically certain to cause the result." Section 18-1-501(6), C.R.S. 1973 (1978 Repl. Vol. 8).

> "A person acts recklessly when he consciously disregards a substantial and unjustifiable risk that a result will occur or that a circumstance exists." Section 18-1-501 (9), C.R.S. 1973 (1978 Repl. Vol. 8).

The trial court's refusal to permit the defendant to offer mental impairment evidence establishing that he lacked the requisite culpability for third degree assault due to adult minimal brain dysfunction was based on section 18-1-803, C.R.S. 1973 (1978 Repl. Vol. 8), which provides:

> "Evidence of an impaired mental condition though not legal insanity may be offered in a proper case as bearing upon the capacity of the accused to form the specific intent if such an intent is an element of the offense charged."

The trial court construed this section to prohibit the admission of all mental impairment evidence in prosecutions for nonspecific intent crimes and the district court adopted the same construction. This construction, in our view, cannot be justified as a legitimate constitutional option.

A.

In several recent cases we have addressed the difference, for constitutional purposes, between limiting an affirmative defense to a certain category of offenses and denying an accused the right to offer evidence in order to contest the essential elements of the charge. People v. Morgan, 637 P.2d 338 (Colo. 1981); People v. Gallegos, 628 P.2d 999 (Colo. 1981); People v. Fite, 627 P.2d 761 (Colo. 1981); People v. Ledman, supra. We noted in these cases that the limitation of the affirmative defense of impaired mental condition to specific intent crimes does not, by itself, either create a presumption of culpability for specific intent crimes or derogate the accused's due process right to prosecutorial proof beyond a reasonable doubt.[5] In each

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[5] We do not read the text of section 18-1-803 as requiring the construction adopted by the courts below. Under the Colorado Criminal Code the issue of responsibility is an affirmative defense. Section 18-1-805, C.R.S. 1973 (1978 Repl. Vol. 8). Section 18-1-803 provides that one may be relieved of criminal responsibility for a specific intent crime by reason of impaired mental condition. The statutory inclusion of impaired mental condition as an affirmative defense has significant consequences for the prosecution's burden of proof. Section 18-1-407, C.R.S. 1973 (1978 Repl. Vol. 8), provides that once some credible evidence on an issue involved in an affirmative defense is presented, the (Continued)

of these cases the defendant's mental impairment evidence was not limited to the issue of specific intent only; thus, the jury was free to consider this evidence in determining whether the prosecution had satisfied its constitutional burden of proof on the requisite mental state of "knowingly." We also emphasized in these cases that a distinct but unanswered question was whether section 18-1-803 could be applied in a manner that prohibited an accused from offering mental impairment evidence to contest the culpability element for nonspecific intent crimes. It is this precise question which is raised here.

As we view it, the construction placed on section 18-1-803 by the trial court renders all mental impairment evidence incompetent as a matter of law for crimes not requiring a specific intent. Although the defendant's proffered evidence was in the form of expert opinion testimony, the logical basis of the trial court's ruling would encompass all evidence of mental incapacity from whatever source, in-

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prosecution must prove the guilt of the defendant beyond a reasonable doubt "as to that issue as well as all other elements of the offense." Thus, where an accused is charged with a specific intent crime and the affirmative defense of impaired mental condition is raised, section 18-1-803 creates a twofold burden of proof for the prosecution. First, it must prove the accused's guilt as to all the essential elements of the crime. Next, it must establish that, notwithstanding the evidence of impaired mental condition, the defendant did have the mental capacity to form the specific intent required for the crime charged. The prosecution's burden in this latter respect might be viewed as proving a negative -- that is, the absence of a mental impairment sufficient to incapacitate the defendant from forming the requisite specific intent. This requirement of proving a negative is not unique in criminal jurisprudence. See Mullaney v. Wilbur, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975). Viewed in light of these considerations, section 18-1-803 represents a statutory affirmative defense for specific intent crimes rather than, as construed by the courts below, a statutory prohibition of mental impairment evidence in all but specific intent offenses.

cluding the defendant. However, we need not labor over the precise limits of the trial court's ruling because, whatever its perimeter, we find it irreconcilable with the basic rights of the accused in a criminal prosecution.

An accused is not only entitled to the presumption of innocence on all elements of a charge but also is protected against a conviction unless the prosecution establishes the requisite mens rea by proof beyond a reasonable doubt. In this case the defendant at trial did not dispute that he caused physical injury to Patricia Styskal. Indeed, the state's evidence on this aspect of the charge was formidable. The only disputed issue was whether the defendant caused the injury with the requisite culpability of "knowingly" or "recklessly" -- a matter which he sought to contest on the basis of adult minimal brain dysfunction. The trial court's exclusion of the mental impairment evidence rendered the prosecution's evidence uncontestable as a matter of law on the issue of mens rea, thus adversely implicating the constitutional presumption of innocence.

Ordinarily the jury in its deliberative process has wide latitude in weighing evidence. For example, it may choose to accept particular evidence offered by the prosecution or the defense and to reject any evidence to the contrary, or it may simply conclude that the prosecution has failed to meet its burden of proof. When, however, an accused is precluded from controverting the prosecution's evidence on the element of mens rea, the jury's deliberative process on that element is limited to the single evidentiary consideration of whether the prosecution has met its constitutional burden of proof. Under such circumstances the issue of mens

rea will be resolved solely on the basis of the jury's inference of this element from the prosecution's uncontestable evidence. An inference, the existence of which as a matter of law cannot be controverted, in practical effect becomes so compelling as to assume all of the features of a presumption. Such a de facto presumption of mens rea clashes head-on with "the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime," including elements of "knowingly" or "recklessly" in the case of third degree assault. Morissette v. United States, 342 U.S. at 275, 72 S. Ct. at 256, 96 L. Ed. at 307; see also Sandstrom v. Montana, supra; United States v. Gypsum, 438 U.S. 422, 98 S. Ct. 2864, 57 L. Ed. 2d 854 (1978); People v. Kanan, 186 Colo. 255, 526 P.2d 1339 (1974).

Similarly, precluding an accused from offering mental impairment evidence to negate culpability undermines the constitutional protection against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In Re Winship, 397 U.S. at 364, 90 S. Ct. at 1073, 25 L. Ed. 2d at 375. This constitutional standard of proof contemplates that a determination of guilt will only ensue if, notwithstanding reliable and relevant evidence to the contrary, the state proves that each essential element of the crime has been established to the requisite level of certitude. A reasonable doubt as to guilt may arise not only from the prosecution's case, but also from defense evidence casting doubt upon what previously may have appeared certain. Denying the defendant any opportunity to controvert the prosecution's case by reliable and relevant evidence of mental impairment, in addition to cutting against

our traditional concept of the adversary system, downgrades the prosecution's burden to something less than that mandated by due process of law. See, e.g., Sandstrom v. Montana, supra; United States v. Gypsum, supra; People v. Cornelison, supra; People v. Kanan, supra; People ex rel. Juhan v. District Court, supra.

Once we accept the basic principles that an accused is presumed innocent and that he cannot be adjudicated guilty unless the prosecution proves beyond a reasonable doubt the existence of the mental state required for the crime charged, it defies both logic and fundamental fairness to prohibit a defendant from presenting reliable and relevant evidence that, due to a mental impairment beyond his conscious control, he lacked the capacity to entertain the very culpability which is indispensable to his criminal responsibility in the first instance. We therefore disapprove the trial court's ruling as violative of due process of law and hold that reliable and relevant mental impairment evidence is admissible, upon proper foundation, to negate the culpability element of the criminal charge.[6]

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[6] Our holding conforms to the Model Penal Code which provides:

> "Evidence that the defendant suffered from a mental disease or defect shall be admissible whenever it is relevant to prove that the defendant did or did not have a state of mind which is an element of the offense." Model Penal Code § 4.02(1) (Tent. Draft No. 4, 1955).

In holding mental impairment evidence admissible, we believe that the trial court appropriately may require the defendant, as the proponent of such evidence, to demonstrate the reliability and relevancy of the proffered testimony as a condition precedent to admissibility. See C.R.E. 104(a) and (b). In this respect the trial court may require the defendant to establish at an in limine hearing the following factors: the qualifications of the prospective witness (Continued)

B.

The People have urged a contrary holding and have raised several policy arguments to that end. These arguments, however, do not reconcile the trial court's ruling with the constitutional rights of the criminally accused. Instead, they focus primarily on the arguably adverse consequences that the admission of mental impairment evidence in the trial of nonspecific intent crimes will hold out for the criminal justice system. Because of this focus we elect to address the People's arguments and explain why we consider them unpersuasive.

The People initially argue that the admission of mental impairment evidence to negate the mens rea for crimes not involving a specific intent would render the insanity defense an unnecessary option in prosecutions for such offenses. This argument fails to properly account for the prosecution's constitutional burden to prove the accused's culpability for the crime charged beyond a reasonable doubt. A person who is criminally insane is excused from criminal responsibility for his actions because, due to a mental disease or defect, he lacks the capacity to distinguish right from wrong with respect to the act or to adhere to the right or refrain from the wrong. Section 16-8-101, C.R.S. 1973 (1978

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to offer opinion evidence on mental impairment, including the witness's familiarity with the requisite culpability element of the crime in question; that the cause of the mental impairment was a recognized mental disease or defect and that the defendant suffered from such impairment at the time of the offense; that the witness has an opinion, at least to a probability, that the disease or defect prevented the defendant from having the requisite culpability for the crime charged; and the facts or data on which the witness bases the opinion.

Repl. Vol. 8).[7] This is not to say, however, that legal sanity is a proxy for mens rea.[8] The prosecution's burden of proof on the requisite mens rea for a crime is no less where the defendant has previously been adjudicated legally sane in a sanity trial than in a prosecution where the sanity issue has not been raised at all. In both instances the requisite mens rea must be proven beyond a reasonable doubt or the defendant is constitutionally entitled to an acquittal. To prohibit the defendant in this case from contesting the mens rea of "knowingly" or "recklessly" except by raising the insanity defense would be nothing short of a conclusive presumption of culpability and, as previously noted, would be constitutionally intolerable.

The People next point to the problems of proof which arise when psychiatric testimony is admissible. In the

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[7] Section 16-8-101 states the applicable test of insanity, and that the jury shall be so instructed as follows:

> "A person who is so diseased or defective in mind at the time of the commission of the act as to be incapable of distinguishing right from wrong with respect to that act, or being able so to distinguish, has suffered such an impairment of mind by disease or defect as to destroy the willpower and render him incapable of choosing the right and refraining from doing the wrong is not accountable; and this is so howsoever such insanity may be manifested, by irresistible impulse or otherwise. But care should be taken not to confuse such mental disease or defect with moral obliquity, mental depravity, or passion growing out of anger, revenge, hatred, or other motives, and kindred evil conditions, for when the act is induced by any of these causes the person is accountable to the law."

[8] Section 18-1-803, which creates the affirmative defense of impaired mental condition for specific intent crimes, is premised on the proposition that a mental disease or defect may be less than legal insanity but nonetheless sufficient to negate the requisite mens rea of specific intent. The logical extension of the People's argument would be to prohibit this affirmative defense in specific intent crimes also, a step which the legislature obviously has not decided to take.

People's view these problems are due primarily to the inexact and tentative nature of psychiatry and would be exacerbated by the admission of mental impairment evidence to negate such culpable mental states as "knowingly" or "recklessly." This argument, however, overlooks the essentially subjective character of the issues relating to criminal culpability. These issues involve moral, legal and medical components and rarely, if ever, will they be resolved on the basis of objective scientific evidence. See, e.g., King v. United States, 372 F.2d 383 (D.D. App. 1967). To be sure, the subjective character of these issues undoubtedly will generate disagreement among psychiatric experts, especially since psychiatry is far from an exact science. Nonetheless, there is no reason to believe that psychiatric testimony is any less helpful to the fact finder in resolving whether a defendant acted "knowingly" or "recklessly" than in determining whether he had the capacity to form the "specific intent." This court long has recognized the reliability and usefulness of psychiatric opinion evidence in a variety of proceedings involving the mental state of an accused. See, e.g., People v. Wright, 648 P.2d 665 (Colo. 1982) (expert testimony, including opinion evidence on minimal brain dysfunction, admissible in sanity trial); People v. Raffaelli, 647 P.2d 230 (Colo. 1982) (expert opinion testimony relating to defendant's mental condition admissible to show that her confession was involuntary); People v. Mack, 638 P.2d 257 (Colo. 1981) (expert opinion testimony admissible to show defendant's mental competency to undergo trial); Garza v. People, ___ Colo. ___, 612 P.2d 85 (1980) (expert opinion testimony admissible on issue of whether the defendant has established good cause for the entry of a plea of not guilty

by reason of insanity after arraignment); Ingles v. People, 92 Colo. 518, 22 P.2d 1109 (1933) (evidence of any mental derangement admissible to negate culpability element for first degree murder).[9] In short, we prefer to rely upon the good sense and judgment of jurors and trial judges in evaluating the opinions of experts, each of whom may express contrary views on a given issue, rather than excluding as a matter of law evidence which cannot help but enhance the reliability of the fact-finding process.

The People's last policy argument is that the protection of the community justifies the exclusion of mental impairment evidence in nonspecific intent crimes. The logic of the People's argument is that, notwithstanding the lack of mens rea for the commission of a criminal offense, mentally disturbed persons should not be completely set at liberty upon their acquittal. As we see it, the solution of the problem posed by the People does not lie in barring the admission of mental impairment evidence to negate the requisite culpability for the crime charged, but rather in providing for the confinement and treatment of persons who are mentally ill and pose a danger to themselves or others. See People v. Wetmore, 22 Cal. 3d 318, 583 P.2d 1308, 149 Cal. Rptr. 265

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[9] The legislature also has recognized the utility of such evidence. Section 16-8-107(2), C.R.S. 1973 (1978 Repl. Vol. 8), provides:

> "In any trial or hearing concerning the defendant's mental condition, physicians and other experts may testify as to their conclusions reached from their examination of hospital records, laboratory reports, X-rays, electroencephalograms, and psychological test results if the material which they examined in reaching their conclusions is produced at the time of the trial or hearing."

(1978); Wesson, Mens Rea and the Colorado Criminal Code, 52 U. Colo. L. Rev. 167, 200 (1981).

C.

In approving the admissibility of mental impairment evidence by psychiatric or psychological experts in order to negate the culpability element of a crime, we recognize a significant distinction between this type of evidence and evidence of self-induced intoxication. Mental impairment evidence is evidence of a mental disease or defect which affects the defendant's cognitive or volitional faculties to the point of rendering him incapable of entertaining the mens rea for the crime charged against him. See, e.g., People v. Gallegos, supra; People v. Ledman, supra; People v. Cruz, 26 Cal. 3d 233, 605 P.2d 830, 162 Cal. Rptr. 1 (1980); State v. Neel, 177 Mont. 93, 580 P.2d 456 (1978). Such a condition will generally result from unconscious processes beyond the actor's control. People v. Gallegos, supra; People v. Ledman, supra. Self-induced intoxication, on the other hand, refers to a disturbance of mental or physical capacities caused by substances knowingly introduced into the body, which the defendant knows or ought to know have the tendency to cause the resulting disturbance. Section 18-1-804(5), C.R.S. 1973 (1978 Repl. Vol. 8).

In People v. Del Guidice, 199 Colo. 41, 606 P.2d 840 (1979), we held that self-induced intoxication was not an affirmative defense to second degree murder and, therefore, evidence of voluntary intoxication was not admissible to negate the culpability element of "knowingly" for that offense. Our decision echoed the legislative policy reflected in section 18-1-804(1), C.R.S. 1973 (1978 Repl. Vol. 8), which provides

that the voluntary intoxication of an accused is not a defense to a criminal charge, except to negate a specific intent when that intent is an element of the charge. Reinforcing this policy was section 18-3-103(2), C.R.S. 1973 (1978 Repl. Vol. 8), which expressly excludes self-induced intoxication as an affirmative defense to second degree murder. An examination of the components of self-induced intoxication points up the basis for this legislative policy and the reasons for our decision in Del Guidice.

The concept of self-induced intoxication, by definition, requires that the defendant be aware at the outset that the substance he is about to ingest may affect his mental faculties. It is a matter of common knowledge that the excessive use of liquor or drugs impairs the perceptual, judgmental and volitional faculties of the user. Also, because the intoxication must be "self-induced," the defendant necessarily must have had the conscious ability to prevent this temporary incapacity from coming into being at all. Self-induced intoxication, therefore, by its very nature involves a degree of moral culpability. The moral blameworthiness lies in the voluntary impairment of one's mental faculties with knowledge that the resulting condition is a source of potential danger to others. See generally Model Penal Code § 208, Comment 3 (Tent. Draft No. 9, 1959). It is this blameworthiness that serves as the basis for Del Guidice's rule of exclusion.[10] Thus, when a defendant chooses to

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10 Involuntary intoxication, in contrast, is without moral culpability and, for this reason, is a complete defense to all crimes. Section 18-1-804(3), C.R.S. 1973 (1978 Repl. Vol. 8), provides:

> "A person is not criminally responsible for his conduct if, by reason of intoxication that is not self-induced at the time he acts, he lacks capacity to conform his conduct to the requirements of the law."

knowingly introduce intoxicants into his body to the point of becoming temporarily impaired in his powers of perception, judgment and control, the policy enunciated in Del Guidice prohibits him from utilizing his intoxication as a defense to crimes requiring the mens rea of "knowingly," "willfully," "recklessly" or "with criminal negligence." There is nothing in Del Guidice, however, that is inconsistent with permitting a defendant to contest these culpability elements by evidence of a mental impairment caused by a known mental disease or defect, or by other evidence of an incapacity not directly caused by self-induced intoxication.[11] Nor does Del Guidice prohibit evidence of voluntary intoxication to disprove the defendant's commission of the proscribed act by showing, for example, that he was comatose and hence incapable of any physical activity. See generally R. Perkins, Criminal Law at 900 (2d ed. 1969).

Obviously, the policy considerations underscoring Del Guidice's rule of exclusion are not present here. There is no moral culpability attaching to a mental affliction. Unlike voluntary drunkenness, a mental impairment such as minimal brain dysfunction is not a condition that may be induced or avoided by conscious choice. In other words, a mental disease or defect does not involve the consciously induced state of cognitive or volitional impairment upon which Del Guidice was premised. And last, in contrast to Del

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[11] By way of example, in addition to evidence of a mental disease or defect, evidence of involuntary intoxication would be admissible. Section 18-1-804(3), C.R.S. 1973 (1978 Repl. Vol. 8). Also admissible would be evidence of intoxication caused by substances introduced into the body "pursuant to medical advice or under circumstances that would afford a defense to a charge of crime." Section 18-1-804(5), C.R.S. 1973 (1978 Repl. Vol. 8).

Guidice, which did not foreclose a defendant from contesting his culpability by evidence unrelated to his voluntary intoxication, the trial court's exclusion of all mental impairment evidence in this case eliminated any meaningful opportunity for the defendant to contest the mens rea of the crime. When we consider the character of the proffered evidence -- expert opinion evidence of a mental disease or defect which significantly affected the defendant's capacity to act with the culpability that was basic to the state's right to hold him criminally responsible at all -- we cannot reconcile the per se exclusion of such evidence with the basic due process rights of the criminally accused.

IV.

The People claim that even if the trial court erred in its ruling prohibiting the admission of mental impairment evidence to negate culpability, the error is nonetheless harmless due to the tenuous character of the defendant's offer of proof with respect to the proffered evidence. We disagree with the People's contention.

The trial court's exclusion of this evidence was not based on some alleged inadequacy in the defendant's offer of proof but on a statutory construction which created a per se exclusion of mental impairment evidence in all prosecutions not involving specific intent crimes. Moreover, the exclusion of the defendant's proffered evidence was an error of constitutional dimension. Last, the effect of the trial court's ruling was to deprive the defendant of any opportunity to controvert the prosecution's evidence on the only issue he was contesting -- whether he acted with the requisite culpability of "knowingly" or "recklessly." In view of the constitutional

nature of the error and the significance of the culpability issue to the ultimate finding of guilt, we cannot deem this error harmless beyond a reasonable doubt. E.g., Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); People v. Hardin, 199 Colo. 229, 607 P.2d 1291 (1980).

The judgment is reversed and the cause is remanded to the district court with directions to return the case to the county court for a new trial in accordance with the views herein expressed.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-1009

THE STATE OF COLORADO,

Petitioner,

vs.

LEE ROY HENDERSHOTT,

Respondent.

MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

The Respondent, who is indigent and whose sole source of income is a social security disability allotment, asks leave to file the attached Brief in Opposition to Petition for Writ of Certiorari to the Colorado Supreme Court without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. Leave to proceed in forma pauperis was granted by the Colorado Supreme Court.

The Petitioner's affidavit in support of this Motion is attached hereto.

Respectfully submitted,

James B. Breese
Attorney for Respondent
LEGAL AID & DEFENDER PROGRAM
Campus Box 404, Fleming Law Building
University of Colorado
Boulder, CO 80309
Telephone: (303) 492-8126

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. A-454

THE STATE OF COLORADO,

Petitioner,

v.

LEE ROY HENDERSHOTT,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Lee Roy Hendershott, being first duly sworn, depose and say that I am the Respondent in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; tht I believe I am entitled to redress; and that I do not believe a writ of certiorari is merited.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Q: Are you presently employed?

   A: No. I was last employed in 1979 by National Construction Company in Boulder, Colorado as a part-time, occasional employee. When employed my wage was five dollars ($5 per hour). I worked one or two days per week.

2. Q: Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

A: No.

3. Q: Do you own any cash or checking or savings account?

A: I have a checking account with a balance of about five dollars ($5.00). I usually have about the same amount in cash.

4. Q: Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

A: No. Except that I own a 1973 Chevrolet pickup truck. Its value is $1700.

5. Q: List the persons who are dependent upon you for support and state your relationship to those persons.

A: My 16 year old daughter, Bridgette Imlay.

6. Supplemental Information

I am single. My sole source of income is social security disability in the monthly amount of four hundred fifty-one dollars ($451.00). I do not receive food stamps.

My average monthly expenditures are as follows:

a. rent: $200.00

b. utilities: $50.00

c. medical dental: $25.00

d. food: $136.00

e. transportation: $40.00

I also have miscellaneous other necessities such as clothing expenses.

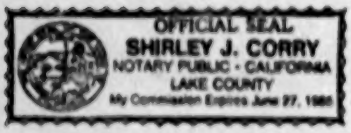
I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Lee Roy Hendershott

Lee Roy Hendershott

STATE OF California)
) ss.
COUNTY OF Lake)

SUBSCRIBED AND SWORN TO before me this 17th day of December, 1982. My commission expires: 6/27/85



Shirley J. Corry

Notary Public